NO. 48468-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

KENNY BAIER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITSAP COUNTY

The Honorable Jeanette Dalton, Judge

CORRECTED BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Mr. Baier was denied a fair trial by admission of hearsay testimony that violated the confrontation clause under the Sixth Amendment and Article I, section 22 of the Washington Constitution.

2. The evidence, absent the improper hearsay, is insufficient to prove Mr. Baier knowingly delivered heroin or knowingly sold heroin for profit.

3. The community custody condition prohibiting Mr. Baier from entering any "bar or place where alcohol is the chief item of sale" is not crime-related.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether Mr. Baier was denied a fair trial by admission of hearsay testimony that violated the confrontation clause under the Sixth Amendment and Article I, section 22 of the Washington Constitution?

2. Whether the evidence, absent the improper hearsay, is sufficient to prove Mr. Baier knowingly delivered heroin or knowingly sold heroin for profit?

3. Where there was no allegation the current offenses were in any way connected to a bar or place where alcohol is primarily

sold, was the court without authority to prohibit Mr. Baier from entering such a place as a condition of community custody?

C. STATEMENT OF THE CASE

1. Background

A jury found Mr. Baier guilty a single count of delivery of a controlled substance, heroin, and sale of a controlled substance, heroin, for profit. CP 37. The jury also found the single delivery leading to both charges occurred within 1,000 feet of a school bus stop. CP 38-39.

The court declined to grant Mr. Baier's request for a Drug Offender Sentencing Alternative ("DOSA") finding it was not a good fit. RP 1/15/16 22-23. The parties agreed that the two charges "merged" for sentencing purposes. RP 1/15/16 5-6. Consequently, the court sentenced Mr. Baier only on the delivery charge. RP 1/15/16 6; CP 19-20. The court imposed a standard range sentence of 50 months in prison plus 12 additional months of community custody. RP 1/15/16 28; CP 20, 22. Among the many community custody conditions imposed, the court required Mr. Baier shall "enter no bar or place where alcohol is the chief item of sale." CP 24.

Mr. Baier appeals all portions of his judgment and sentence. CP 30.

2. Motion in Limine

Prior to trial, the court heard motions in limine. RP 11/17/15 3-39. Supplemental Designation of Clerk's Papers, Defendant's Motions in Limine (sub. nom. 28). Mr. Baier moved to exclude certain testimony. Specifically,

> 7. No testimony or reference to the confidential informant's telephone call with the Defendant. These statements are hearsay and do no fall within any hearsay exception. As a result this phone conversation cannot be offered to show that the informant and the defendant arranged to meet for a drug transaction. Additionally, because there statements would rely on statements made by the confidential informant, the admission of this testimony would violate the defendant constitutional confrontation clause. U.S. Const. amend VI. *State v. Hudlow*, 182 Wash. App. 266, 331 P.3d 90 (2014).

Because the State did not plan to have the informant testify, Detective Krista McDonald could not hear the person the informant was talking to, but could only hear the informant's portion of the phone call, the court agreed with Mr. Baier in part and set specific limitations on the State's evidence. RP 11/18/16 48-64. Detective McDonald could only testify that she directed the informant to arrange to buy heroin and that after the arrangement was made

over the phone, she and another detective drove the informant to where the buy was supposed to occur. RP 11/18/16 64.

3. Trial Evidence and Instructions

The evidence at trial was of a standard controlled buy. RP 11/18/15 98. Detective McDonald told informant Hall to call somebody she could buy heroin from. RP 11/18/15 105; RP 11/19/15 160. Hall made a cell phone call. Id. Detective McDonald did not have any personal knowledge of who Hall called. Detective McDonald could not hear who, if anyone, Hall spoke to. RP 11/18/15 50.

Detectives McDonald and Bower searched Hall and her purse at a discreet location. RP 11/18/15 111; RP 11/20/15 215. They give Hall $60 of prerecorded buy money. RP 11/18/15 107. They drove Hall to Bremerton, a half-hour drive. Id. 108. Other detectives had set up surveillance in a WinCo parking lot. RP 11/20/15 180, 195. Mr. Baier was identified as the target and at least one detective saw a picture of him. RP 11/20/15 196. Hall was let out of the detective's car at a nearby Dairy Queen. Id. RP 11/20 218. She was under constant surveillance as she walked into the WinCo parking lot. RP 11/20/15 187. She contacted a car after it parked in the lot. RP 11/20/15 200-01. Mr. Baier was the car's

passenger. Id. 200. Hall exchanged something through the passenger window with Mr. Baier. Id. 202. Hall returned to the detective's car while still under surveillance. She handed the detectives a plastic baggy containing a pea-sized brown substance which tested positive as heroin. RP 11/18/15 111; RP 11/19/15 171-73.

Mr. Baier and the female driver was surveilled to an apartment complex. The detectives made no effort to contact him. RP 11/20/15 205.

The detectives searched Hall. They found no buy money or anything else of interest. RP 11/20/15 218-19.

At trial, the State proposed, and the court instructed the jury that to be guilty of both the delivery and the sale for profit that the State had to prove Mr. Baier specifically know the controlled substance was heroin. Supplemental Designation of Clerk's Papers, Prosecutor's Proposed Jury Instructions (sub. nom. 31B) and Court's Instructions to the Jury (sub. nom. 36), Instructions 12 and 15.

D. ARGUMENT

1. Mr. Baier was denied a fair trial by admission of hearsay testimony that violated the confrontation clause under the Sixth Amendment and Article I, section 22 of the Washington Constitution.

The Sixth Amendment Confrontation Clause provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. Amend. VI. This right is made binding on the states through the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

Article I, section 22 of the Washington Constitution similarly provides, "[i]n criminal prosecutions the accused shall have the right ... to meet the witnesses against him face to face." In *State v. Shafer*, 156 Wn.2d 381, 128 P.3d 87 (2006), our Supreme Court concluded that article I, section 22 can offer higher protection than the Sixth Amendment with regard to a defendant's right of confrontation. *Id*. at 391-92, 128 P.3d 87 (*citing State v. Foster*, 135 Wn.2d 441, 957 P.2d 712 (1998)). An alleged violation of the Confrontation Clause is subject to de novo review. *Lilly v. Virginia*, 527 U.S. 116, 137, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999); *State v. Kirkpatrick*, 160 Wn.2d

873, 881, 161 P.3d 990 (2007). A Confrontation Clause violation may be raised for the first time on appeal. *State v. Hieb*, 107 Wn.2d 97, 108, 727 P.2d 239 (1986); RAP 2.5(a)(3) (manifest error affecting a constitutional right).

Until the Supreme Court decided *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), hearsay statements made by unavailable declarants were admissible if an adequate indicia of reliability existed, i.e., they fell within a firmly rooted hearsay exception or bore a "particularized guarantee of trustworthiness." *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), *overruled by Crawford*, 124 S.Ct. 1371 (2004).

Under *Crawford*, "[w]here non-testimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law . . . as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." *Crawford*, 124 S.Ct. at 1374. The State can present non-testimonial hearsay under the Sixth Amendment subject only to evidentiary rules. *Davis v. Washington*, 547 U.S. 813, 821, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006).

But if testimonial hearsay evidence is at issue, the Confrontation Clause requires witness unavailability and a prior opportunity for cross-examination. *Crawford*, 124 S.Ct. at 1374. After *Crawford*, a state's evidence rules no longer govern confrontation clause questions. *See United States v. Cromer*, 389 F.3d 662, 679 (6th Cir.2004). The State has the burden on appeal of establishing that statements are non-testimonial. *State v. Koslowski*, 166 Wn.2d 409, 417 n. 3, 209 P.3d 479 (2009).

a. The challenged testimony is inadmissible "backdoor" hearsay.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. ER 801(c). Hearsay is inadmissible as evidence, with a few well-established exceptions. ER 802; *Whelchel v. Wood*, 966 F.Supp. 1019, 1024 (E.D.Wash. 1997), *aff'd sub nom. Whelchel v. Washington*, 232 F.3d 11979 (9th Cir. 2000). The trial court's factual determination of whether a statement falls within an exception to the hearsay rule will not be disturbed absent an abuse of discretion. *State v. Strauss*, 119 Wn.2d 401, 417, 832 P.2d 78 (1992). A court reviews de novo

whether the court's ruling rests on an erroneous understanding of the law. *State v. Walker*, 136 Wn.2d 767, 771–72, 966 P.2d 883 (1998).

Attempting to eliminate a hearsay problem by rephrasing questions in a way that avoids direct quotes from the declarant is wrong. In *State v. Martinez*, this Court held, "Inadmissible evidence is not made admissible by allowing the substance of a testifying witness's evidence to incorporate out-of-court statements by a declarant who does not testify. *United States v. Sanchez*, 176 F.3d 1214, 1222 (9th Cir. 1999) (*citing United States v. Check*, 582 F.2d 668, 683 (2d Cir. 1978))." *State v. Martinez*, 105 Wn. App. 775, 782, 20 P.3d 1062 (2001).

In *Check*, the State asked a police officer to recount - without telling the court what the absent informant actually said - what the officer's reactions were and what the state of his knowledge was after the informant spoke. This was "a transparent conduit for the introduction of inadmissible hearsay information obviously supplied by and emanating from the informant ...." *Check*, 582 F.2d at 678.

Here, the State elicited testimony that Detective McDonald told informant Hall to make arrangements to buy heroin and was with Hall when she made the arrangements to do so via a cell phone call. RP 11/18/15 105; RP 11/19/15 160. Detective McDonald then search informant Hall's person and purse, gave her buy money, and drove her to the parking lot in Bremerton where she was dropped off to do the deal. *Id*. As in *Check*, having Detective McDonald Carlton testify to the nature of her understanding after listening to informant Halls' portion of the phone conversation instead of reporting what the CI actually said was simply an attempt to circumvent the rule. The evidence was inadmissible hearsay. *Hudlow*, 182 Wn. App. at 278-79; *Martinez*, 105 Wn. App. at 782.

This testimony is troublesome. Through this impermissible hearsay, the jury heard that informant Hall made arrangements with someone to purchase drugs, specifically heroin, at a specific place in Bremerton and at a specific time. Coupled with other evidence that Mr. Baier was the intended target and he in fact showed up in the parking lot when informant Hall arrived, it would appear the

State had made its case. The problem is that Detective McDonald had no personal knowledge of the truth of the matters stated. Based on Detective McDonald's entire testimony, the State's case is considerably weakened without the backdoor hearsay of informant Hall's testimony. Mr. Hudlow had a right to confront the informant. The evidence was inadmissible hearsay. *Martinez*, 105 Wn. App. at 782.

b. The evidence at issue is testimonial.

When a confidential informant gives information to a police officer for use in a criminal investigation, those statements are testimonial; any "formality" in the statements is irrelevant. *Cromer*, 389 F.3d 662. Here, the challenged evidence was clearly testimonial.

c. The State failed to show the witnesses were unavailable and there was no prior opportunity for cross-examination.

Informant Hall did not testify at trial. At time of trial, she was apparently living in the area as defense counsel was able to interview her in person mid-trial. RP 11/20/15 181. There was no record of any prior cross-examination of informant Hall. *Crawford*, 124 S.Ct. at 1374.

d. The confrontation violation was not harmless.

A confrontation violation is a trial error which must be evaluated in the context of other evidence presented to determine whether it was harmless. *Whelchel*, 996 F.Supp. at 1024 (citing *Arizona v. Fulminante*, 499 U.S. 279, 307–08, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)). Harmlessness must be determined on the basis of the remaining evidence. *Coy v. Iowa*, 487 U.S. 1012, 1021–22, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988); *State v. Palomo*, 113 Wn.2d 789, 798-99, 783 P.2d 575 (1989). Washington law requires affirmation of the jury's verdict only if the "overwhelming untainted evidence" supports the jury's verdict. *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985).

Here, the only evidence establishing the "[knowledge] that the substance delivered was a controlled substance - heroin" element of delivery and sale for profit - as instructed - was Detective McDonalds's account of the substance of the informant Hall's out-of-court statements. Without the tainted hearsay, there remains evidence only that Mr. Baier was the

intended target of the police project and he in fact showed up in the parking lot when informant Hall arrived. This is not "overwhelming" evidence of guilt and is insufficient to support the convictions – as charged for knowingly delivering, and selling for profit, heroin.

The testimony of informant Hall - presented through Detective McDonald - was inadmissible hearsay, introduced in violation of the confrontation clause. The error was not harmless.

2. The evidence was insufficient to establish Mr. Baier knew he was delivering methamphetamine as required under the law of the case.

The Due Process Clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). This includes elements added under the "law of the case" doctrine. *See State v. Hickman*, 135 Wn.2d 97, 954 P.2d 900 (1998). An instruction to which no objection is made becomes the "law of the case." *Hickman,* 135 Wn.2d 97.

Delivery of a Controlled Substance ordinarily requires proof that the accused knew that the substance was a controlled

substance. *State v. Nunez-Martinez*, 90 Wn. App. 250, 95 1 P.2d 823 (1998). Here, the State charged Mr. Baier with two crimes: (1) unlawful delivery of a controlled substance heroin, in violation of RCW 69.50.401(1), alleging that he "knowingly and unlawfully deliver[ed] a controlled substance, to wit: Heroin"; and (2) knowingly selling for profit a controlled substance …, to wit: Heroin" in violation of RCW 69.50.410. CP 8-9.

The trial court's "to convict" instructions for Count I, the delivery, set forth the following element: "That the defendant knew that the substance delivered was Heroin." Supp. DCP, Court's Instructions to the Jury (Instruction 12). The trial court's "to convict" instructions for Count II, the sale for profit, set forth the following element: That the defendant knew that the substance sold was Heroin. Supp. DCP, Court's Instructions to the Jury (Instruction 15). Because the State proposed and did not except to the "to convict" instruction, the instruction became the law of the case. Supp. DCP, Prosecutor's Proposed Jury Instructions; Supp. DCP, Court's Instructions to the Jury. RP 11/20/15 233-36. *Hickman*, 135 Wn.2d at 101–02 (jury instructions to which the State failed to object are the law of the case, and assignment of error may include a challenge to the sufficiency of evidence of an

element added in the instruction); *State v. Ong*, 88 Wn. App. 572, 577–78, 945 P.2d 749 (1997) (same). *See also State v. Barringer*, 32 Wn. App. 882, 887–88, 650 P.2d 1129 (1982) (State assumed burden of proving unnecessary element in its proposed instructions), *overruled in part on other grounds by State v. Monson*, 113 Wn.2d 833, 849–50, 784 P.2d 485 (1989). Thus under Instructions No. 12 and 15, the State was required to prove that Mr. Baier knew the item he delivered and sold to Ms. Hall contained heroin, and not merely a generic controlled substance or other contraband or even a legal substance. *Ong*, 88 Wn. App. at 577.

In *Ong*, the defendant was accused of giving a morphine tablet to a child. To prove that he knew the tablet was morphine, the State presented evidence consisting of "(1) Ong's five felony convictions; (2) Ong's drug paraphernalia (i.e., syringes, a straw, smoking device, cotton); (3) the small numbers marked on the tablets; (4) his testimony that he knew the pills were "pain medication"; (5) his testimony that he stole the pills; (6) and his flight to Bremerton, showing consciousness of guilt." *Ong*, 88 Wn. App. at 577-578 (footnote omitted). The Court held that "[N]othing in this evidence points to knowledge that the substance was

morphine rather than any other controlled substance," and noted that the Uniform Controlled Substances Act lists nearly 240 substances. *Ong*, at 578, n. 8.

In this case, the State presented even less evidence. The record contains no direct evidence that Mr. Baier knew heroin was a controlled substance. After excision of the tainted hearsay evidence, the State's remaining circumstantial evidence – Ms. Hall made a call, Mr. Baier showed up as a passenger in a car, and Mr. Hall handed Ms. Hall a pea-sized item, wrapped in plastic, later determined to contain heroin - does not support a reasonable inference that Mr. Baier knew item was heroin (as required by the to-convict instructions and the law of the case).

The evidence is insufficient to prove Mr. Baier's personal knowledge that the plastic-wrapped item contained heroin. The convictions must be reversed and the case dismissed with prejudice. *Ong,* 88 Wn. App. 572.

3. The court was without authority to impose a "no bars" condition of community custody

The court erred in imposing a community custody condition prohibiting Baier from entering any "bar or place where alcohol is

the chief item of sale." CP 24. The conditions therefore should be stricken from the judgment and sentence as it is not crime-related.

Although the defense did not object to the challenged sentencing conditions below, sentencing errors may be raised for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) *reversed in part on other grounds*, 164 Wn.2d 739, 193 P.3d 678 (2008); *State v. Jones*, 118 Wn. App. 199, 204, 76 P.3d 258 (2003). Whether the trial court had statutory authority to impose specific community custody conditions is a question of law reviewed de novo. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

The Sentencing Reform Act of 1981, chapter 9.94A RCW, allows trial courts to impose crime-related prohibitions during the course of community custody. RCW 9.94A.505(8); RCW 9.94A.703(3)(f). A crime-related prohibition is an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted. RCW 9.94A .030(10). Crime-related prohibitions may last only as long as the maximum sentence allowed for the associated offense. *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008). A community

custody condition is overbroad if it encompasses matters that are not crime-related. *Bahl*, 137 Wn. App. at 714-15.

In *State v. Zimmer*, Zimmer was convicted of methamphetamine possession. 146 Wn. App. 405, 410-11, 190 P.3d 121 (2008). The trial court imposed a community custody condition prohibiting her possession of cellular phones and data storage devices. *Id*. at 411. The appellate court reversed, holding the condition did not directly relate to Zimmer's crimes. *Id*. at 413.

Though such devices may be used to further illegal drug possession, the court explained, there was no evidence in the record (1) that Zimmer possessed a cell phone or data storage device in connection with possessing methamphetamine, or (2) that she intended to distribute or sell methamphetamine using such devices. Id. at 414.

In *State v. O'Cain*, O'Cain was convicted of second degree rape. 144 Wn. App. 772, 774, 184 P.3d 1262 (2008). As a condition of community custody, the trial court prohibited O'Cain from accessing the internet without prior approval from his community corrections officer (CCO) and sex offender treatment provider. *Id*. at 774. The court struck the condition, reasoning:

> There is no evidence in the record that the condition in this case is crime-related. There is no evidence that O'Cain accessed the internet before the rape or that internet use contributed in any way to the crime. This is not a case where a defendant used the internet to contact and lure a victim into an illegal sexual encounter. The trial court made no finding that internet use contributed to the rape.

Id. at 775.

Similarly, in *Jones*, the court held it was error to mandate alcohol counseling, without evidence to indicate the requirement of alcohol counseling was crime-related. *Jones*, 118 Wn. App. at 207–08.

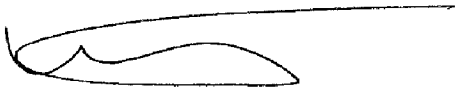
As in the above cases, there is no evidence the challenged condition is crime-related. There is no evidence Mr. Baier went to a bar before the offenses or that bars contributed in any way to the charged offenses. The court therefore was without authority to impose the conditions.

E. CONCLUSION

Both convictions should be reversed and dismissed for insufficient evidence.

In the alternative, the hearsay and confrontation violations require reversal and remand for further action. Also, the no bar or place where alcohol is the chief item of sale community custody condition should be stricken.

Respectfully submitted October 5, 2016.



LISA E. TABBUT/WSBA 21344
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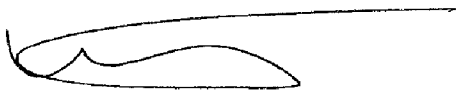
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled the Corrected Brief of Appellant to (1) Kitsap County Prosecutor's Office, at kcpa@co.kitsap.wa.us; (2) the Court of Appeals, Division II; and (3) I mailed it to Kenny Baier/DOC#367808, Olympic Corrections Center, 11235 Hoh Mainline, Forks, WA 98331.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed October 5, 2016 in Winthrop, Washington.



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